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No. 87-1746

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THE SOUTHLAND CORPORATION, *et al.*,
Petitioners,

v.

RICHARD D. KEATING, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Superior Court of the County of Alameda, California

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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The Petition for Certiorari anticipates, and adequately deals with, most of respondents' arguments, but the following should be briefly noted by petitioners The Southland Corporation, *et al.* ("Southland") in reply:

1. The opposition brief reinforces petitioners' argument that respondents have attempted to manipulate this Court's jurisdiction by taking inconsistent positions. Respondents' current position is that the California Supreme Court "impliedly" ruled in 1982 that a class action arbitration procedure would not be inconsistent with federal law. (Brief in Opp. at 6-7.) This is not the position they took when the litigation was previously before this Court. At that time, they argued that the state courts had decided the issue "*solely* in terms of state law." [1]

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[1] Respondents' Motion to Dismiss at 6, *Southland Corp.* v. *Keating*, 465 U.S. 1 (1984) (No. 82-500) (emphasis added). *See also* Brief of Appellees at 13, *id.*

Respondents' effort to reconcile their contradictory positions by semantic legerdemain is illogical. It is true that the California law of the case doctrine applies not only to issues that were actually addressed in a prior opinion but also to questions that were "essential to the decision" (*see* Brief in Opp. at 7), but respondents have not explained how this principle applies to the instant case. If, as respondents have represented, the California Supreme Court ruled in 1982 only that class action arbitrations are permissible under *California* law, it obviously was not essential to the decision for the court to consider and decide that such a procedure is not preempted by federal law.

An issue is "essential" to a decision only if the court actually faced it in its analysis or could not have decided the case as it did without considering it;[2] the doctrine does not apply to other issues that might have been, but were not, raised and decided.[3] In this sense, the federal preemption issue cannot be said to be "essential" to the California Supreme Court's decision that class action arbitrations are permissible under California law. The policies underlying the Federal Arbitration Act differ from the policies underlying the California arbitration statute,[4] and the preemption issue involves different considerations than the state-law issue.[5]

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[2] *See Gyerman* v. *United States Lines Co.*, 7 Cal. 3d 488, 498, 102 Cal. Rptr. 795, 498 P.2d 1043, 1049 (1972); *Gore* v. *Bingaman*, 20 Cal. 2d 118, 124 P.2d 17, 19 (1942); *Lindsey* v. *Meyer*, 125 Cal. App. 3d 536, 542, 178 Cal. Rptr. 1, 3 (1981).

[3] *E.g.*, *County of San Diego* v. *Milotz*, 46 Cal. 2d 761, 300 P.2d 1, 4-5 (1956); *Steelduct Co.* v. *Henger-Seltzer Co.*, 26 Cal. 2d 634, 160 P.2d 804, 809 (1945).

[4] *See, e.g., Perry* v. *Thomas*, 107 S. Ct. 2520 (1987); *Southland Corp.* v. *Keating*, 465 U.S. 1 (1984), holding that California statutes and policies regarding arbitration were inconsistent with the Federal Arbitration Act.

[5] In California, as elsewhere, courts do not automatically consider federal preemption issues when interpreting state law. *See, e.g.*,

2. Respondents mistakenly rely on *Northern Pacific R.R.* v. *Ellis*, 144 U.S. 458 (1892), for the proposition that this Court lacks jurisdiction when an issue was first raised in state court after a remand from an earlier appeal. (Brief in Opp. at 4-5.) *Ellis* involved a situation where the parties were engaged in two separate suits involving title to various parcels of land, the first being in state court, the second in federal court. In the first case, the critical issue was finally resolved against the defendant by the Wisconsin Supreme Court, and became *res judicata*, without any petition for review being filed in this Court. Later, in the second action, involving different parcels of land but the same legal issues, the critical issue was resolved in defendant's favor. Defendant then attempted to relitigate the issue in the first case. The effort was rebuffed by the Wisconsin courts. This Court held that when a decision has become *res judicata* under valid state-law principles, a party cannot create federal-question jurisdiction by obtaining a different result in a different case from a federal court.

Ellis is distinguishable for several reasons. First, the defendant in that case was not attempting to raise a new legal issue on remand; it was simply trying to reopen an already decided issue on the basis of a contrary ruling obtained from another trial court in another case. Second, *Ellis* did not involve a situation where a party had avoided review in this Court at an earlier stage of the same case by taking a position contrary to the one

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San Diego v. *Superior Court for San Diego*, 67 Cal. App. 3d 361, 375, 136 Cal. Rptr. 557, 565-66, *cert. denied*, 434 U.S. 859 (1977) (earlier case finding aircraft operator liable under state law for effects of aircraft noise, without addressing federal preemption, will not be deemed to have ruled on federal preemption point); *Plumbing, Heating & Piping Employers Council* v. *Quillin*, 64 Cal. App. 3d 215, 134 Cal. Rptr. 332, 334 n.3 (1976) (when court in prior appeal applied state statute and relied on federal authority that it considered to be consistent with state law "the preemption issue was not reached").

being taken at the later stage; nor did it involve a situation where a state-law doctrine was being applied contrary to governing precedent so as to defeat this Court's jurisdiction. Third, the *res judicata* doctrine involved in *Ellis* is fundamentally different from the law of the case doctrine applied here, because the California law of the case doctrine only applies to particular issues that have been actually or impliedly decided. Here, the federal preemption issue was not previously decided, and if it *had been*, that fact would establish this Court's jurisdiction. *See Yazoo & Mississippi Valley Ry.* v. *Adams*, 180 U.S. 1, 9, 13-15 (1901).

3. Respondents misleadingly suggest that Southland took the position in the earlier appeals that state law governed. What actually occurred was this: The clerk of the California Court of Appeal asked the parties in 1979 to address the question whether the Federal Rules of Civil Procedure were applicable to class certification proceedings in the state court.[6] Southland briefly responded to the question by citing cases involving the *Erie R.R.* v. *Tompkins* doctrine and stating that state courts are free to apply "their own procedural rules in litigation involving a federal substantive right, *provided that such application does not result in the violation of a federal right.*" [7]

Southland did not further urge its federal preemption argument on the first appeal only because California law at that time appeared to disallow class arbitration, *see Vernon* v. *Drexel Burnham & Co.*, 52 Cal. App. 3d 706, 125 Cal. Rptr. 147 (1975); *Frame* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 20 Cal. App. 3d 668, 97 Cal. Rptr. 811 (1971), and Southland believed that the

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[6] Letter dated May 18, 1979, *Keating* v. *Superior Court*, 109 Cal. App. 3d 784, 167 Cal. Rptr. 481 (1980) (1 Civil 45162).

[7] [Southland's] Supplemental Memorandum of Points and Authorities in Opposition to Petition for Writs of Mandate or Prohibition at 21 n.15, *id.* (emphasis added).

California Supreme Court would adhere to this precedent. Southland did not, at any time, argue or imply that federal law would be inapplicable if California law were changed, as it was by the California Supreme Court's unprecedented creation of a class action arbitration procedure in its 1982 decision in this litigation. Since that time, Southland has unequivocally argued that such a procedure conflicts with the policies of the Federal Arbitration Act.

* * *

The substantive issue presented in the Petition merits review by this Court. Respondents have desperately attempted to avoid resolution of this important federal question by taking inconsistent positions and by persuading the California courts to ignore this Court's mandate in *Keating*. We submit that the respondents should not be permitted to succeed in their effort to defeat this Court's jurisdiction. Therefore, a writ of certiorari should be issued.

Respectfully submitted,

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